



The Comptroller General  
of the United States

Washington, D.C. 20548

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## Decision

Matter of: Hobart Brothers Company

File: B-222579

Date: July 28, 1986

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### DIGEST

While request for proposals identified a brand name product and only permitted consideration of an alternate product that was physically, mechanically, electrically, and functionally interchangeable with the named product, the agency accepted an alternate product that deviated from these solicitation requirements. Because the acceptance of the deviating product showed that the solicitation overstated the government's needs, termination of awarded contract and resolicitation of the requirement are recommended by the General Accounting Office.

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### DECISION

Hobart Brothers Company (Hobart) protests the award of a contract for a welding system and accompanying manuals to Sciaky Brothers, Inc. (Sciaky) under request for proposals (RFP) No. DLA400-85-R-C891, issued by the Defense General Supply Center, Defense Logistics Agency (DLA), Richmond, Virginia. Hobart essentially alleges that DLA misled the firm by overstating its minimum requirements for the welding system in the solicitation and that this became apparent to Hobart only upon award of the contract to Sciaky whose product failed to comply with the RFP's purchase description. We find that Sciaky's product could not properly be accepted by DLA under the terms of the solicitation and we therefore sustain the protest.

### BACKGROUND

The solicitation was issued on September 23, 1985, and described the item as "Dabber Welder, Model 200409-R3 Hobart, Inc." The solicitation contained a "Products Offered" clause that permitted firms to offer alternate products that were "either identical to or physically, mechanically, electrically, and functionally interchangeable" with the named product. "Identical product" or "exact product" was defined by the solicitation as the identical product cited in the purchase description and either manufactured by the listed manufacturer or manufactured by a firm which manufactures the product for the listed manufacturer. The solicitation

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generally provided that award would be made to the responsible offeror whose offer conforming to the solicitation is the most advantageous to the government, cost or price, and other factors specified in the solicitation, considered. However, while the RFP required offerors of alternate products to furnish detailed technical information concerning the product being offered, including drawings, specifications and other data, the RFP did not contemplate the submission of competing technical proposals by offerors and did not specify for evaluation purposes any other factors besides cost or price elsewhere in the solicitation. Thus, the basis for award was essentially price alone between firms offering the named product and firms offering an alternate product found to be qualified by DLA.

Hobart offered the specified product, its model No. 200409-R3 welding system, at a price of \$209,044 by the October 23 due date. Hobart states that since it assumed that the specified model, with its particular features, represented DLA's minimum needs, it refrained from offering less expensive or otherwise modified equipment. DLA, however, also received an offer from Sciaky for its model "Acuweld System 500" at a price of \$165,000. By letter dated November 6, 1985, the contracting officer referred Sciaky's proposal to the military using activity--Naval Air Rework Facility, Marine Corps Air Station, North Carolina--for "review and findings as to acceptability." In a short reply letter dated November 20, 1985, and without further technical explanation or analysis, the using activity simply stated that the "[o]ffer is technically acceptable based on review of provided information." DLA thereupon awarded the contract to Sciaky and this protest followed.

#### CONTENTIONS BY HOBART

Hobart argues that the solicitation did not state the government's minimum needs, a fact which did not become known to the firm until award was made to Sciaky for a product that is asserted to be technically less sophisticated than the specified Hobart model. Hobart gives the following examples of the technical differences between the two welding systems:

1. The Hobart Dabber employs a mechanical wire feed control which permits wire to be pulled in and out of the weld puddle while the Sciaky system can only regulate the speed of entry of the wire into the puddle. This Hobart mechanical wire feed control serves as a temperature control which permits welding at lower heat levels which, in turn, reduces the likelihood of weld cracking, particularly in the types of sensitive high alloys used in aircraft engines.
2. The Sciaky system employs a "TIG" welding process, while the Hobart Dabber employs a "Plasma Arc" welding process. The TIG welding process uses high frequency current each time a welding arc is initiated while the Plasma Arc welding process only requires the use of high frequency to initiate a pilot arc, thereby reducing the likelihood of high frequency interference with the welding and other equipment.

3. The two systems use different computer controls: Sciaky uses an Allen-Bradley computer control, while the Hobart Dabber uses an Anorad Computer Numerical Control. The Anorad is precise to 1/10,000th of an inch while the Allen-Bradley is not.

4. Necessity for adjustment of parameters (i.e., amperage, travel speed, or feed rate) is different on the two systems.<sup>1/</sup>

Had it known of the government's true requirements, Hobart states that it could have offered a modified product of lesser sophistication or otherwise offered more competitive rates. (Based on commercial literature submitted by Hobart, it does appear that the Hobart model specified by DLA is among its higher cost systems.) Hobart concludes that DLA failed to obtain full and free competition in the procurement. Hobart also complains that award was improperly made on initial proposals without the benefit of discussions.

#### ANALYSIS

As stated above, DLA employed a purchase description specifying a welding system model manufactured by Hobart and further providing that any alternate products "must be either identical to or physically, mechanically, electrically, and functionally interchangeable" with the Hobart model. The agency, despite the opportunity to do so, has not even attempted to show that the Sciaky product that it accepted was physically, mechanically, electrically, and functionally interchangeable with the Hobart product. Thus, except for including Sciaky's short letter to our Office in the agency report, DLA ignored Hobart's specific allegations concerning the technical differences between the two systems. Rather, the agency merely states that the Sciaky product was "technically acceptable" in the sense that the offered product functionally meets its

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<sup>1/</sup> In a short letter to our Office, Sciaky disputes the existence of some, but not all, of these technical differences. For example, Sciaky acknowledges that the product it offered DLA employs a TIG welding process rather than Hobart's Plasma Arc welding process. Specifically, Sciaky states while its product is capable of employing the Plasma Arc welding process, it here offered equipment with the TIG welding process because of its concerns about certain unidentified specifications of the Naval Air Kework Facility, Marine Corps Air Station, North Carolina. Sciaky also acknowledges that the two systems use different computer controls (Sciaky's commercial literature indicates that the Acuweld System 500 is precise to 2/1000th of an inch in comparison with the Hobart model's 1/10,000th of an inch). However, Sciaky states that it has "proprietary software" which increases the precision of its equipment to the same level as Hobart's equipment. It does not appear from the record, however, that delivery of this proprietary software to DLA was contemplated by this solicitation.

minimum needs.<sup>2/</sup> In support of this position, DLA further states that during the procurement, the Marine Corps technical personnel learned that the Air Force was also purchasing the Sciaky system for similar repair work. DLA concludes that it reasonably determined that the Sciaky product was functionally interchangeable with the Hobart product.

We do not agree with DLA's arguments because this is not a "brand name or equal" procurement. The overriding consideration in determining the equality or similarity of another product to the named product for purposes of acceptability in a brand name or equal procurement is whether its performance capabilities can be reasonably equated to the brand name product referenced, that is, whether the "equal" product offered can do the same job in a like manner and with the desired results, not necessarily whether certain design features of the named product are present in the "equal" product. Lista International Corp., 63 Comp. Gen. 447 (1984), 84-1 CPD ¶ 665. Here, instead of employing the standard brand name or equal clause with listed salient characteristics, DLA specified in the solicitation that any non-identical alternate product was required to be physically, mechanically, electrically as well as functionally interchangeable. Yet, the record shows that DLA accepted the Sciaky product on a simple finding of functional equivalence and DLA does not argue that the Sciaky product meets the other mandatory characteristics specified. Accordingly, we find that the solicitation overstated DLA's needs, represented by the award to Sciaky, because DLA's needs could have been satisfied by specifying a brand name product or its functional equivalent, i.e. a simple brand name or equal procurement. In this regard, Federal Acquisition Regulation (FAR), § 10.004 (FAC No. 84-5, April 1, 1985) provides as follows:

"(P)urchase descriptions for acquisitions shall state only the Government's actual minimum needs and describe the supplies and/or services in a manner designed to promote full and open competition."

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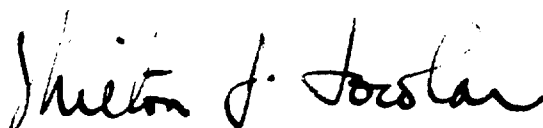
<sup>2/</sup> DLA states that the using activity's technical personnel made the determination of technical acceptability for the Sciaky product based on a July 1985 Sciaky demonstration of their welding process under the "Blade/Vane Technology Program," where Sciaky adequately demonstrated its welding capability and also sent a number of weld samples to the Marine Corps Air Station, North Carolina. Additionally, Sciaky submitted a letter of reference and an inspection report from an independent laboratory. Based on this information, the technical personnel concluded only that the Sciaky sample welds were "of equal quality to welds made" by the Hobart system, and that therefore the Sciaky system "is capable of performing the welds as required." DLA has not explained why the solicitation, issued in late September, did not specify the Sciaky system as an acceptable product in addition to the Hobart system.

We find that DLA failed to comply with this provision because its purchase description was unduly restrictive in specifying much more than the actually required functional equivalence. Accordingly, we sustain the protest on this issue.

Concerning the proper remedy, although Sciaky's product apparently satisfied the agency's minimum needs, the Sciaky model simply did not conform to the requirements of the "Products Offered" clause. If DLA had more carefully stated its needs and required characteristics, other offerors (including Hobart) might have offered a suitable product at a lower price. Indeed, as noted above, Hobart insists that it would have offered a modified product had it known of DLA's true needs. We have held that because of potential unfairness to other offerors, the proper remedy in this situation is to resolicit the requirement with revised specifications reflecting the government's actual needs. See American Automotive Machinery, Inc., B-204385, Dec. 24, 1981, 81-2 CPD ¶ 494. Accordingly, we recommend that the contract award to Sciaky be terminated for the convenience of the government and that DLA resolicit the requirement, using an appropriate specification or description that is consistent with FAR § 10.004, supra.

The protester requests reimbursement of its costs of filing and pursuing the protest, including reasonable attorney's fees. However, our Bid Protest Regulations limit the recovery of the costs of filing and pursuing a protest to situations where the protester is unreasonably excluded from the procurement, except where this Office recommends that the contract be awarded to the protester and the protester receives the award. 4 C.F.R. § 21.6(e) (1986). We have construed this to mean that where, as here, the protester is given the opportunity to compete for the award, recovery of the costs of filing and pursuing the protest is inappropriate. See Galveston Houston Co., B-219988.4, Nov. 4, 1985, 85-2 CPD ¶ 519. We therefore deny the protester's request for the reimbursement of such costs.

The protest is sustained.

*for*   
Comptroller General  
of the United States